gested by HHIs that are calculated on the assumption that national and local advertising markets are separate.[39]

On the supply-side, for example, the amount of advertising time on both broadcast and cable network programs that is used for network advertising and the share that is used for spot advertising are subject to negotiation and market incentives. Also, stations and cable systems are free to change the allocation of their spot advertising time between local and national sales, and local newspapers and other local media can do the same. In addition, according to a securities analyst, "the emergence of Fox, cable networks, and nationally syndicated shows sold on barter has pulled time out of the local pool into national time."[40]

On the demand side, national advertisers can substitute between buying advertising from national station representatives and buying in each local area. McDonald's Corp. provides a recent example:

> In a stunning move, the fast-food giant, with the blessing of its franchisees, is shifting much of its local ad spending to national TV media in 1995. A majority of the company's local/spot budget will now be earmarked for national network, cable and syndication....Franchisees formerly contributed roughly 4.25 percent of monthly sales to their co-ops; 44.7 percent of this money went to the national advertising fund, while the rest funded local programs. Now, 68.2 percent of that money will go to the national fund, with only 31.8 percent toward local marketing.[41]

The article goes on to quote Fox's Jon Nesvig on McDonald's switch:

> "You always get money shifting back and forth, but it may not always be one advertiser," Mr. Nesvig said. "And if network prices go

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39 The 1992 DOJ/FTC *Horizontal Merger Guidelines* explain, at §1.522, that for a given HHI the magnitude of any potential competitive problem depends on the extent of substitution between products in the relevant market and products outside the relevant market.

40 M.T. Cook, *Television Broadcasting—Industry Report*, Prudential Securities, May 4, 1993.

41 Wayne Walley, *McDonald's Yanks Local Ads; Broadcasters See Other Options*, ELECTRONIC MEDIA, Dec. 19, 1994, at 2.

> up too much as a result, someone else will shift spending to spot and local."[42]

Because national and local advertising markets are closely related on both the supply-side and the demand-side, a given HHI measured in either market alone does not have the same implications that it would have in a relevant market that did not exclude any substitutes.

2. Other forms of advertising and promotion

A similar argument can be made for any alleged advertising market that does not include all advertising and promotion. If a relevant "market" is defined to include only some subset of advertising, clearly there will be a number of substitutes, for example direct mail and telemarketing, just outside the market. Because there are such substitutes near the border of the "market," a given HHI does not have the same implications it would have in a relevant market that did not exclude any substitutes.

F. Collusion is unlikely

There is another reason that an HHI should not raise concern just because it exceeds some arbitrary threshold, such as 1,800. Even if broadcast television were found to compete in national or local advertising markets for which concentration and entry barriers were sufficiently high to raise *prima facie* concerns under prevailing antitrust standards, anticompetitive conduct would be unlikely. An anticompetitive increase in broadcast television advertising rates would require the coordinated efforts of not only television broadcasters, but also companies supplying advertising time and space in various other media. An effective collusive agreement limited to broadcast television would be at best difficult to reach and maintain. A successful conspiracy to raise advertising prices would be even more difficult to achieve and maintain for companies involved in the various different media that would be included in a properly-defined antitrust advertising market.

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42 *Id.*

Prices (CPMs) for television advertising time are a function of the size and demographic composition of the audience, whether the broadcast time and audience size are guaranteed, the buyer's volume of advertising, when the ad is placed (for example, in the up front or scatter marketplace), and numerous other variables. Referring to the Fournier and Martin analysis,[43] the FTC staff noted that:

> [A]n impressive array of characteristics was found to influence the price of an advertising spot. The fraction of homes the spot is expected to reach, the absolute number of homes the spot is expected to reach, and the uncertainty connected with the spot's reach were all found to play a significant role in determining price. Each of these characteristics differs in turn depending upon the program shown, the time of day the program is shown, and the type of station (affiliate or independent) showing the program. This apparent complexity in determining the price of any particular spot would serve to increase the difficulty that networks or their affiliates [or independents] would encounter in any attempt to collude successfully on the price of spots....In short, this study suggests overall that the obstacles to achieving and maintaining anticompetitive conduct in broadcasting are significant.[44]

Thus, it would be difficult for sellers of broadcast advertising time to reach agreement on a full array of prices for potential advertising contracts, and it would be difficult for them to determine whether any given contract violated the terms of an anticompetitive agreement. Furthermore, information on actual transactions prices for advertising are not publicly available, and thus monitoring of prices to detect cheating would require overt illegal activity—exchanging contracts.

One media planner who was interviewed by Economists Incorporated noted that if she thought television stations were trying to charge anti-

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43 Gary M. Fournier and Donald L. Martin, *Does Government-Restricted Entry Produce Market Power?: New Evidence from the Market for Television Advertising*, 14 BELL JOURNAL OF ECONOMICS 44–56 (Spring 1983).

44 *Comments of the Bureaus of Consumer Protection, Economics, and Competition of the Federal Trade Commission before the Federal Communications Commission*, In the Matter of the Syndication and Financial Interest Rule, BC Docket No. 82–345, FCC, Jan. 27, 1983, at 22–24, footnote omitted.

competitive prices, she would respond by buying time from only some of the stations. She would attempt to lead the other stations to believe that the stations that made sales were cheating on the anticompetitive agreement by undercutting the cartel price. Such behavior could help to undermine any hypothetical agreement.

Inclusion of cable television, radio, newspapers and other media in a conspiracy to raise advertising prices would further complicate an already formidable task. For example, it would be difficult to reach agreement on the relative prices of advertising supplied by different media. Price elasticities of demand for advertising, margins of prices over variable costs, and conditions for new entry—all of which affect the prices at which a cartel would maximize profits—would certainly differ among the various media that compete with broadcast television. As a result, companies in different media would be likely to have quite different views on how much a cartel should raise prices.

The implication of this discussion is that tacit collusion is unlikely to be successful in the markets in which television advertising is sold, even if the HHIs in these markets significantly exceed 1,800.

G. Conclusion

There is considerable evidence that the relevant antitrust markets in which to evaluate ownership of national and local advertising media are a good deal broader than the markets tentatively proposed by the Commission. In properly-defined product markets, the HHI does not exceed 1,800 for national advertising or for local advertising in any of the five DMAs analyzed for illustrative proposes. Thus, none of these markets is highly concentrated under the standards of the DOJ/FTC *Horizontal Merger Guidelines*. This alone indicates that anticompetitive behavior is unlikely.

Anticompetitive behavior is unlikely for two additional reasons. First, the exercise of market power in the relevant advertising markets would require collusion. It would be very difficult, not to mention unlawful, to reach, monitor and enforce a collusive agreement. Second, in a properly-defined product market, there would be scope for entry. As a result, even

HHIs significantly over 1,800 do not imply that the exercise of market power is likely.

The analyses in this section and in Appendix D demonstrate the feasibility of analyzing the competitive effects of changes in station ownership in markets for advertising. These analyses also provide a model that the Commission might use to conduct similar analyses. For example, the analyses here suggest the types of advertiser interviews and documents that can be used to define markets as well as the sources from which data on market shares can be obtained.

The analyses of advertising markets in the present section of this report are applied to the evaluation of the Commission's national ownership, local ownership and one-to-a-market rules in Sections VI through VIII. Those sections conclude that concerns over competitive effects in advertising markets do not provide a rationale for the prohibitions imposed by these rules.

IV. The Commission's Video Program Production Market

A. Introduction

The purpose of this section is to explore the issues raised by the Commission's ownership rules in the market where video programming is bought and sold. The focus here is on the demand side of the market—that is, the purchase of programming. The purchase of video programming has implications for both the national ownership rule and the local ownership rule. The national ownership rule has only a limited effect on concentration among video purchasers at the national level, because television stations are not the only or even the principal purchasers of video programming. No station ownership restriction is needed to preserve competition in purchasing video programming at the national level. The purchase of video programming is also of some relevance for the local ownership rule, since television stations compete among themselves and with other local video providers to purchase local rights to video programming. The current local ownership rule, based on Grade B contours, is not well-suited to deal with potential competitive concerns, which are unlikely to arise in any event.

Competitive analysis typically focuses on the potential exercise of market power in the selling of goods or services produced by firms in a market. It is also possible that firms can exercise market power in the purchase of inputs. Under certain conditions, a single buyer or a small group of buyers acting in a coordinated fashion could have an incentive to reduce the purchases of some input below the amount that would be chosen under competitive conditions. The purpose of reducing purchases would be to reduce the price that the firm or firms would then pay on the remaining purchases of this input. The harm to society results not from the lower price, but from buyers purchasing "too little" of the input, less than the amount that would maximize social welfare. The Commission's interest in the purchasing of video programming is motivated by the possibility of monopsony or oligopsony power.[45]

B. Product market

Broadcast stations require programming to show to their audiences. Many stations produce a portion of their programming themselves. This is typically news and public affairs programming, but it can also include coverage of other local events such as sports. Some station groups also produce entertainment programming such as local talk shows. Whatever programming is not produced internally must be purchased from other sources, including networks and syndicators.[46] As noted in Section II, the programming shown on broadcast television is substitutable with programming distributed by cable, DBS and other satellite services, and through video cassettes. The personnel and equipment used to create this programming are also largely undifferentiated, and can move freely from producing programming for one distribution outlet to producing for another outlet. The proper product market in which to consider the programming purchases of television stations should include all video programming.

C. Geographic markets and competitive consequences

1. National market

The scope of the geographic market in which to consider the possibility of market power in the purchase of video programming depends on the exhibition rights that are being purchased for the programming. National exhibition rights permit the purchaser to distribute the programming to an audience located anywhere in the country, typically through a specified distribution medium and for some specified period of time or number of viewings. National exhibition rights are purchased by broadcast networks, syndicators, cable networks, DBS operators, distributors of

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45 *See* FNPRM, *supra* note 1, ¶46.

46 Programming can be purchased either through a money payment, or through granting advertising time to the programming supplier, such as a network or barter-syndicator.

MMDS, SMATV and satellite dish programming services, and distributors of video cassettes. National rights to video programming are purchased from suppliers throughout the United States and even from foreign sources. The market in which national rights are purchased should be considered a national market for purposes of analyzing issues of buyer market power.

2. Local markets

Broadcast stations purchase programming primarily from networks or syndicators. For non-network programming, stations are restricted by Commission regulations from purchasing exclusive program exhibition rights except in a limited local area.[47] A broadcast station seeking to purchase the exhibition rights to non-network programming in its own local area competes against other stations in that area to obtain those rights. Any local station can purchase the rights, and if the rights are purchased by one station in the area they cannot be purchased by another station in the area. However, a station does not compete against stations located outside its area, because stations outside the area are prohibited from purchasing exclusive rights within the area. Even if they were not, it is unlikely that a station would seek to buy rights outside of its own broadcast area because such rights would have no value to that station. Accordingly, the local area for which a station may purchase exclusive rights is the relevant geographic market in which to analyze competition among broadcast stations for non-network programming.

Stations also compete among themselves to acquire programming through affiliation with a broadcast network. In general, each network attempts to form a primary affiliation with one station in each DMA. Stations located in separate DMAs therefore do not compete for network affiliation. In most instances, each commercial station within a DMA can compete for network affiliation against all other commercial stations in

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47 Broadcast stations are prohibited from acquiring non-network programming rights that would prevent a broadcast station in a community located more than 35 miles away from broadcasting the same programming. The 35-mile limit can be exceeded if the station against which the rights would be exercised is located in the same hyphenated market. *See* 47 CFR § 73.658(m).

the DMA. In a few instances, even stations located in the same DMA may not compete for affiliation. ABC, CBS and NBC each has more than one primary affiliate in a few DMAs, typically those in which a second affiliate can significantly improve the network's coverage of the DMA.

Competition among broadcast stations and other video distributors for rights to distribute programming in a local market tends to increase the prices paid for programming rights in that market. If all the broadcast stations and other video distributors in a local market were owned by a hypothetical monopsonist, the price paid for video programming rights in that market would probably be reduced. In purchasing local rights to national programs, the price reduction in a single market would have a negligible effect on the quantity of national programming available to a typical broadcast market. The price reduction would occur because of an increase in bargaining power that a hypothetical single buyer would have compared with multiple competing buyers.[48] Stations and others may also purchase rights to a relatively small amount of programming produced specifically for the local market. For such programming, a reduction in the price paid would probably reduce the amount or quality of such programming. However, this effect is best analyzed as a potential reduction in the quality of programming offered to attract viewers (see Section II) rather than as monopsonistic behavior.

As noted, stations within the local market do not compete against stations outside the market for the purchase of programming. As a consequence, joint ownership of stations in different local markets cannot increase concentration or market power in any local market. However, multiple station ownership can decrease the price of programming for pro-competitive reasons because a station group can offer several benefits to the program seller. Each seller of programming incurs transactions costs in dealing with individual stations. When stations in different markets have a common owner, it is possible for the seller to reduce transactions costs by dealing with a single owner instead of multiple individual

48 Bargaining power affects only the distribution of profits and not output, and is distinct from market power, which affects resource allocation. Defined this way, there is no economic basis for policy concern with bargaining power.

stations. In addition, the program seller's risk that the program will be a commercial failure can be reduced substantially by a purchase commitment from a station group. Station groups recognize the transaction cost savings and risk reduction that the seller receives, and may negotiate with the seller to share the benefits. For this reason, the group-owned stations may pay a lower price for programming than they would have paid were they not part of a group. The lower price for programming results not from anticompetitive behavior, but from the ability of a group-owned station to offer benefits which a single station does not offer. These transaction cost savings are the kind of efficiencies that market forces should be permitted to encourage, and which can be lost through excessive regulation. The efficiencies from group ownership are discussed further in Section VI.B.

D. Concentration

1. National market

Precise figures on shares of purchases of national video rights are not available. However, even under conservative assumptions, video purchases are not concentrated.

Total 1994 expenditures on programming, net of distribution fees, are estimated in Table 6. One could construct an HHI that would vastly overstate actual concentration by assuming ABC, CBS and NBC each had an equal share of purchases, and assuming that each type of programming purchaser listed in the table represented a single purchaser. The resulting calculation yields an HHI of approximately 1,500. Even this grossly overstated concentration level would not qualify as highly concentrated under the DOJ/FTC *Merger Guidelines*.

Table 6 Expenditures on video programming net of distribution fees[49]

	Expenditures ($ millions)	Share of total expenditures (percentage)
Total ABC, CBS and NBC	3,447	28.1
Fox	689	5.6
Syndication	2,897	23.6
Basic cable	1,618	13.2
Pay cable	1,255	10.2
Home video	2,365	19.3
Total	12,271	100.0

A somewhat more refined concentration estimate can be prepared by estimating the shares of individual firms within the categories of syndication, basic cable, pay cable and home video. An HHI based on commonly-owned purchasers of video programming is less than 800, well within the range that the DOJ/FTC *Merger Guidelines* consider unconcentrated. See Appendix G.

These estimates show that concentration among national purchasers of video programming is low. As noted earlier, broadcast stations do not participate in this market because they do not purchase national exhibition rights. It is conceivable that a group of stations could become sufficiently large and geographically dispersed that it would seek to purchase national exhibition rights for the entire station group. One way to estimate the effect of such a hypothetical development on the concentration of programming purchases would be to assume that the new station group would purchase approximately as much programming as the Fox Network currently purchases, and that all this programming would displace purchases made by the smallest syndicators. Even under these assumptions, the hypothetical new company would have a share of under 6 percent, and the HHI estimated above would increase by only about 20.

49 Source: See Appendix G.

2. Local markets

Commercial broadcast television stations compete to some extent with non-commercial stations and cable operators in the purchase of programming. For some programming such as Telemundo or home shopping that may be carried on cable or a broadcast station, local cable systems clearly compete with broadcast stations. There are examples of programming being shown both on commercial stations and on public stations or cable. For instance, first-run episodes of *I'll Fly Away* aired on NBC affiliates, and then were distributed by PBS.[50] *Beakman's World* is an example of a first-run syndicated show that ran simultaneously on broadcast television and The Learning Channel, a cable network.[51] Both cable and non-commercial stations could compete with commercial stations to cover local events. Most cable operators have public access channels for which programming is produced or purchased. In addition, some cable operators produce news or other programming to show on a cable channel. In principle, local program rights could also be purchased for carriage on an MMDS system or a VDT system. The possibilities for competition that commercial stations may face from non-commercial stations, cable operators and others in purchasing programming make it appropriate to reflect the presence of these purchasers in evaluating local concentration. The concentration analysis that follows assumes that these other purchasers can be represented as the equivalent of an additional commercial broadcast station.

Information on the programming purchases of broadcast stations and others, were it available, would be extremely complex. Stations and other local program purchasers not only make monetary payments to acquire programming from syndicators and from local producers, they also turn over advertising time to networks and syndicators as payment in kind for programming received. It would be very difficult to translate this advertising time into dollars that could be compared across program purchasers,

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50 *I'll Fly Away*, NEW YORK, Oct. 11, 1993, at 79.

51 Steve Coe, *Learning Channel to Share "Beakman's World,"* BROADCASTING, Aug. 31, 1992, at 17.

since the programming itself affects the value of the advertising time, and because prices for spot advertising are not public.

Two alternative approaches may be used in place of programming purchase shares. For both approaches, it is assumed that broadcast television stations compete to purchase programming only with other stations located in a 35-mile radius. Concentration estimates would be lower if all stations in the DMA were included, as may be more appropriate in considering competition for network affiliation or for non-network programming in hyphenated markets. The first approach recognizes that since all broadcast stations have to obtain enough programming to fill the broadcast day, stations acquire or produce approximately the same number of hours of programming, although the programming differs in value. An HHI can be calculated based on the simple assumption that all stations in a market (plus an additional "station" representing purchases by cable and others) make the same video purchases. This HHI is presented in Table 7 for five illustrative cities. Because it fails to account for differences in the value of programming purchased, this HHI probably understates concentration.

A second approach, also shown in Table 7, uses stations' viewing shares as a proxy for their shares of video purchases. These HHIs also include an additional "station" representing cable and other local program purchasers. Actual viewing of cable is largely attributable to cable networks and overstates the viewing importance of locally purchased programming. Instead of its actual viewing share, the cable "station" is assigned a share based on the rating received by the lowest-rated broadcast station in the 35-mile area. A station's viewing share may overstate or understate its importance in purchasing programming. For instance, suppose two very similar independent stations are competing to affiliate with a broadcast network. The station that obtains the affiliation will likely begin to have higher ratings than the unaffiliated station. However, their divergent ratings may not reflect a significant advantage or disadvantage in competing to renew the affiliation. For this reason, viewer shares may not accurately reflect stations' relative significance in competing for video programming. Overstating the differences between stations may cause the

HHI based on viewing shares to be overstated. Consequently, the HHIs in Table 7 probably bracket the correct values.

Table 7 Estimated video purchase HHIs in five illustrative cities[52]

DMA	Number of full-power commercial broadcast stations in 35-mile radius	Equal shares HHI, broadcast stations and cable	Viewing shares HHI, broadcast stations and cable
New York	8	1,111	1,622
Cleveland	8	1,111	1,978
Portland	6	1,429	2,107
Richmond	5	1,667	2,655
Amarillo	4	2,000	2,504

E. No current market power

The difficulties of coordinating a reduction in the competition to purchase programming are essentially the same as those discussed in Section II in connection with competition to attract viewers. These difficulties make it unlikely that stations could coordinate their actions to reduce the price paid for programming. In a typical local market, there is significant competition among broadcast stations and others to purchase video programming. Nothing in the foregoing analysis suggests that any station group under common ownership has or is likely to acquire market power in the purchasing of video programming.

F. Conclusion

The purchase of national rights to video programming by networks, syndicators, station groups and others is unconcentrated. It is extremely unlikely that television station groups would obtain or exercise market power in purchasing video programming. Television stations also com-

52 Source: See Appendix C.

pete in local markets for video programming rights. Though concentration among stations and other local purchasers is higher in some local areas, the exercise of monopsony or oligopsony power is unlikely.

V. Diversity

A. Introduction

The Commission has invited comment on the "diversity markets" relevant to evaluation of the ownership rules. Although it must be acknowledged that diversity is an issue that transcends economics, this section attempts to apply the tools of economic analysis to the questions posed by the Commission. Two conclusions are reached. First, for the Commission to mandate greater diversity than what a competitive market supplies is necessarily to reduce consumer economic welfare. The Commission should take account of this possible cost of its policies. Second, sensibly-defined "diversity markets" are likely to be broader and less concentrated than relevant economic or antitrust markets. Thus, a transaction that passes muster under the standards of competition policy is likely also to pass muster under any reasonable diversity standard.

In the Further Notice, the Commission identifies three relevant types of diversity: viewpoint, outlet and source.[53] Viewpoint diversity apparently is synonymous with diversity of program content, because the Commission uses its now-defunct program content regulations to illustrate "direct" regulation of viewpoint diversity.[54] These "direct" regulations required broadcasters to offer minimum amounts of various program types, and to present a variety of viewpoints, but did not require broadcasters to offer access to others. Outlet diversity "refers to a variety of delivery services (*e.g.*, broadcast stations) that select and present programming directly to the public."[55] Source diversity "refers to ensuring a variety of program producers and owners."[56] Finally, according to the Commission,

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53 FNPRM, *supra* note 1, ¶¶54–80.

54 *Id.* ¶¶57–59.

55 *Id.* ¶61.

56 *Id.*

its "core concern with respect to diversity is news and public affairs programming especially with regard to local issues and events."[57]

The Commission's diversity concerns are thus at bottom content concerns; diversity of outlets and sources is a proxy for measuring or a tool for achieving content diversity. Source diversity in particular does not appear to be deeply implicated by the ownership rules. Hypothetical problems of monopsonization with respect to program sources could in principle result from increased concentration of outlets. See Section IV. But there is no reason to suppose that this would affect content diversity. (A monopsonist might buy fewer programs or pay less for them, but if the monopsonist operates in the competitive output market it might have to produce the same degree of diversity as a non-monopsonist.) Therefore the focus here is chiefly on outlet and viewpoint diversity.

The Commission's objective of ensuring diversity of viewpoints, especially with respect to local news and public affairs, is not on its face an economic goal. The role of economic analysis with respect to this issue is therefore somewhat circumscribed. It is unclear, for example, whether the Commission seeks a degree of diversity greater than what an efficient competitive private market would provide, and if so, what the basis may be for sacrificing consumer economic welfare to that end. Does the Commission believe that an unregulated (as to ownership) competitive market would, in this industry, reflect imperfections resulting in a less-than-efficient degree of diversity? What imperfections would produce this result?

There is a literature in economics on the effect of various market imperfections, such as monopoly, on the range of products offered in a market.[58] There is no general inference that can be drawn from this literature

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57 *Id.* ¶72.

58 *See, e.g.,* Peter O. Steiner, *Program Patterns and Preferences, and the Workability of Competition in Radio Broadcasting,* 66 QUARTERLY JOURNAL OF ECONOMICS 194 (1952); L. Rothenberg, *Consumer Sovereignty and the Economics of TV Programming,* 4 STUDIES IN PUBLIC COMMUNICATION 45 (1962); BRUCE M. OWEN & STEVEN S. WILDMAN, VIDEO ECONOMICS 26–99 (1992). Bruce Owen is president of

that either competitive or monopolistic broadcasters offer an inefficiently narrow range of viewpoints. For example, a firm in control of two channels may program the two channels so as to reach different audiences, whereas two single-channel competitors may each seek to reach the larger audience, and thus duplicate programming.

A related point is that there is no clear connection between viewpoint diversity and consumer welfare. The Commission in the past has often assumed that more voices are better than fewer, in spite of the possibility that consumer welfare might be enhanced with fewer, for the reasons just stated. A more straightforward example of the connection between diversity and consumer welfare may lie in the ownership rules themselves. To the extent that the ownership rules prevent the broadcasting industry from operating at minimum cost, for example, costs are imposed on consumers in exchange for putative increases in diversity. There seems to be no evidence, or basis for an assumption, that consumers would regard this price as worth paying.

Indeed, if the present rules are a binding constraint on ownership concentration, it follows that they do sacrifice efficient production.[59] The reason for this conclusion follows. Broadly speaking, there are two reasons why broadcast groups, for example, might survive or grow: (1) because to do so increases market power with respect to some group of customers or suppliers, or (2) because to do so lowers costs or increases service quality and hence demand. For the reasons set out elsewhere in this Report, an increase in group ownership that lies within the standards of the *Merger Guidelines* seems unlikely to increase anyone's market power. Similarly, an increase in local concentration that does not violate the *Merger Guidelines* is unlikely to confer market power. It follows that the impact of the rules is chiefly to impose an inefficiently small form of organization on the broadcasting industry.

Economists Incorporated.; JEAN TIROLE, THE THEORY OF INDUSTRIAL ORGANIZATION 115 (1988).

59 A discussion of the efficiencies and advantages of group ownership appears in Section VI. B., *infra*.

In spite of these reservations and limitations, the discussion that follows attempts to apply the tools of economic analysis to the diversity issues raised by the Commission in the Further Notice. It is a given that local news and public affairs is the chief focus of diversity concerns. Then, using the framework of antitrust analysis to the extent it is applicable, it is necessary to ask what "markets" are relevant to the analysis of the ownership regulations, what degree of concentration is present in these "markets," and what if any effect the ownership rules have on the performance of these "markets."

B. Analytical framework

In order not to continue putting the word "market" in quotation marks throughout this section, it is important to emphasize here at the outset that market in the antitrust sense is not intended. An antitrust market is a collection of products or services in a defined geographic area that it would be profitable to monopolize. Thus, in an antitrust market, consumers find products outside the market insufficiently close substitutes for those in it, and outside suppliers or suppliers of other products cannot in sufficient numbers switch to the manufacture of the products in question. Further, entry is difficult, and all of this is true even after a hypothetical monopolist of the market has raised prices or reduced quality.

When speaking of the marketplace of ideas or diversity markets the proper test for market definition involves service quality rather than price. An analytical approach to the diversity market asks that one imagine a particular group of media, controlled by a hypothetical monopoly or cartel that has begun to produce news and public affairs programming with a monolithic viewpoint (*e.g.*, "liberal" or "conservative"). Then one must ask what, if any, sources of alternative (in this case, political) viewpoints are available to consumers, to which they *could* turn. (For reasons explained in the next sub-section, the issue of "would" should not arise.) Similarly, on the supply side, it is necessary to ask what suppliers of other programming (*e.g.*, entertainment) could switch to the production of differing viewpoints on local news and public affairs.

The antitrust market definition paradigm can be carried about this far before it begins to encounter difficulties. For example, it is reasonable to assume that all these media seek to maximize profits. It follows that the monolithic viewpoint of the hypothetical monopolist must be profit-maximizing. Perhaps this is so because the reduction in audience demand and advertising revenue that accompanies the restriction of viewpoints is small, and does not offset the cost savings from offering fewer viewpoints. The *Merger Guidelines* ask whether a hypothetical monopolist could raise prices by, say, 10 percent, without inducing significant demand- or supply-side substitution or entry. There is no obvious similar test for the decreased content diversity in the broadcasts of a hypothetical media monopolist, because there is no metric of diversity. Nevertheless, assuming that the reduction in content diversity leaves an unsatisfied demand among consumers, other media stand to increase their audiences, and hence their profits, by serving it. Similarly, unsatisfied consumers will have a demand for their preferred viewpoint on other media, if other media are available. So, in a general way, the antitrust paradigm remains applicable, even though there is no rigorous test for market definition.

C. Demand-side market definition

A key question is the extent and intensity of consumer demand for alternative viewpoints, and hence the size of the potential audience available to firms responding on the supply side. Because the whole exercise of seeking to protect content diversity is futile if consumers are indifferent to alternative viewpoints, it is reasonable to assume that the demand for alternative sources would be considerable in the event that a hypothetical monopolist homogenized the viewpoints expressed by a particular collection of outlets. There has long been a tension in broadcast regulation surrounding this assumption. It is possible to view certain earlier decisions, such as *Red Lion Broadcasting v. FCC* 395 U.S. 367 (1968), as based on the opposite assumption. That is, these decisions viewed consumers as passive and therefore imposed on broadcasters an affirmative obligation to inform their audiences with respect to important issues. Whatever may have been true in the past, modern consumers, armed with computers to surf the Internet and remote controls to graze on dozens or hundreds of video channels, can be regarded as active shoppers.

Although local news and public affairs television broadcasts are the focus of the Commission's diversity concerns, it is surely the viewpoints expressed in such broadcasts that are important, rather than the format of the programming. How can a program devoted to a stand-up comic satirizing local political figures be distinguished from a panel of reporters discussing the same figures? Anyway, for the Commission to make such distinctions seems futile and dangerous. There does not seem to be any basis to deny that consumers seeking particular viewpoints on local issues can satisfy their demand with vehicles other than formal local news and public affairs broadcasts. A narrow focus on news and public affairs programs cannot be justified based upon a concern with the diversity of viewpoint expression.

Analysis of diversity that is limited to video programming (and video-displayed services such as computer networks)—perhaps based on the alleged "visual impact" of video services—is not reasonable.[60] Video programming is only one source of viewpoints for consumers, even if one focuses on viewpoints regarding local news events and public affairs issues. All media that expose consumers to viewpoints should be weighed in measuring diversity. These include television and other video services, radio, newspapers, magazines, books, direct mail, door-to-door leaflets, and live discussions.

Similarly, it makes little sense to attempt to define markets in terms of whether the medium is subject to public interest obligations.[61] Newspapers, under no such "obligations" as broadcasters, typically offer far more local news and public affairs coverage than broadcast stations. They do so because it is profitable, a far better guarantee of performance than the Commission's waning "direct" content regulation of broadcasters.

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60 FNPRM, *supra* note 1, ¶74.

61 *Id.*, ¶¶68, 74.

Nor does it make sense to define these markets in terms of whether the medium is "free" once the consumer has purchased reception equipment.[62] While the cost of access to substitute media is certainly a material consideration in defining markets, there is no reason to exclude media that are not "free" in the narrow sense that broadcast television is free. For example, a viewer seeking viewpoints on local affairs may be able to pick up much more information in 30 minutes with the newspaper than with 3 hours of local TV news broadcasts. That the newspaper costs 50¢ while the broadcast is "free" offers little insight into the degree of substitutability *in response to a change in the diversity of viewpoints offered in one medium.*

Further, the Commission suggests as a criterion for market definition whether the medium can deliver viewpoints within a small number of hours of an event.[63] It is difficult to see what this criterion has to do with viewpoint diversity. In any event, virtually all the media under consideration are capable of meeting this criterion, at least in certain situations. Radio stations obviously can match TV stations exactly in this respect, or better them. Many newspapers are capable of producing editions with breaking news within a few hours of events, and at most, for dailies, within about 12 hours. In any event, timeliness is but one dimension of the services in question here, and cannot be regarded as dispositive in itself.

The Commission proposes to consider, in market definition, whether the medium is actually used by more than some threshold percentage of the population, and whether it is "used by more people as their primary news source" than other media.[64] This makes no sense for two reasons. First, just because one medium is a "primary" source does not mean that other media are not important sources of diversity. Second, the Commission's proposal confuses market share with market definition. That a medium has a large share of a hypothetical market does not prove that the hypo-

62 *Id.*, ¶68.

63 *Id.*, ¶¶69, 74.

64 *Id.*, ¶74.

thetical market is properly defined. Nor is there any basis to require a medium to have some minimum share before it "counts" as being in the market. A market share is just that. Properly measured, a market share usually reflects the competitive significance of the medium as a demand-side substitute. A market with 19 firms, one with 10 percent and the others 5 percent each does not justify the conclusion that the 18 smaller firms don't count and that the 10-percent firm is a monopolist. Thus, there is no basis to exclude, say, MMDS or VDT media from the market because these media have small audiences; their market shares will reflect their significance, and may even understate it, for reasons discussed below.

D. Supply-side market definition

The issue that must be considered on the supply side is whether a medium that does not now produce local news and public affairs programming could or would do so in response to an opportunity to increase its audience. (The opportunity is created, in the market definition paradigm, by the behavior of the hypothetical monopolist in offering fewer viewpoints.) This question must be asked first of firms already present in the market but not offering demand-side substitutes for local news and public affairs. Going beyond such firms, there is an issue of entry: would the behavior of the hypothetical monopolist make it profitable for entirely new firms to enter the business?

As noted above, it is reasonable to assume that the demand for alternative sources would be considerable in the event that a hypothetical monopolist homogenized the viewpoints expressed by a particular collection of outlets. That is, assuming that the pre-monopolization spectrum of content diversity was efficient, the paradigm of political freedom as well as the ease with which today's consumers can consider alternatives require the assumption that consumers, deprived of this spectrum, would actively seek out alternatives. It follows that all local media with low costs of making format changes would be able and willing to respond to the hypothetical restriction of viewpoints. This includes, for example, all radio stations, whether or not they had an all-news format at the outset.

Similarly, there does not seem to be any basis to exclude independently-controlled local cable channels, actual and potential. (That is, it would be reasonable to include currently-unleased leasable cable capacity.)

If the Commission's concern is primarily with local news and public affairs,[65] then the market must include the following outlets: broadcast stations (full power and low power), cable systems, MMDS, radio stations, local newspapers and national magazines and newspapers that have local editions. In the case of cable systems, only PEG, leased access and locally originated cable news channels should be counted, as national cable networks cannot offer local content. There is at least an argument that videocassettes should also be included. Since most households (84 percent) have VCRs, the distribution of videocassettes provides a potential means of expression with respect to local news and public affairs. In some circumstances, video cassettes have provided an important medium of anti-establishment political and cultural expression.[66]

E. Geographic market definition (outlets)

For different issues or rules, the relevant areas from which consumers can obtain viewpoints would be international, national, regional and local.

1. Local markets

The Commission states that for the local ownership rule the relevant market in which to measure diversity is local. The same apparently is true for the radio-TV cross-ownership rule.[67] Local must mean the areas to which the local news and public affairs programming that forms the Commission's chief focus is applicable. The local geographic market would therefore start with the area served by the station in question (to

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65 *Id.*, ¶¶72.

66 *See, e.g.*, Sharif Imam-Jomeh, *Iran Seizes Satellite Dishes, Lifts VCR ban*, Reuters News Service - Middle East, Feb. 17, 1994 (on-line); Marjorie Olster, *Palestinians Document Their Uprising on Video*, Reuters News Service - Middle East, May 31, 1989 (on-line); *Oman: Plans for Censor Office at SEEB airport*, TIMES OF OMAN, Jul. 18, 1994.

67 *See* FNPRM, *supra* note 1, ¶¶76, 78.

which one of the ownership rules is to be applied) and the viewers or listeners within it. The media available to those consumers include those located within that area and serving it or capable of serving it, as well as those outlets that are outside the area but serving it or capable of serving it.

2. National market

The Commission states that for the national ownership rule the relevant market in which to measure diversity is national, and the question is whether there is sufficient diversity of outlets in the nation as a whole.[68]

With respect to both local and national markets, there is an issue of how to treat media whose geographic reach is limited. For example, most cable systems do not reach all of the area served by a broadcast station. Some magazines and cable networks are regional. This is largely a question of measurement rather than market definition. Within a relevant market, it is perhaps most useful to ask how many alternatives are available to a representative or average viewer, or even to describe the whole spectrum of consumers according to the number and types of choices they face. Often, this will solve the problem of partial coverage. For example, though many magazines or cable networks are regional, the average consumer probably has about the same number of regional choices in various parts of the country, even though they are not the same choices. Similarly, because cable coverage is so ubiquitous, consumers everywhere are likely to have access to the alternatives available on cable systems, even though no single cable system serves the whole market.

On the national level, these considerations lead to the conclusion that all national media should be included in the relevant geographic market, as well as all local media capable of covering national news and public affairs. But because local media in one area are not available to consumers in others, it is important not to count local media cumulatively. As indi-

68 *Id.*, ¶75.